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19 AMERICA'S SERVICING COMPANY

20 **UNITED STATES DISTRICT COURT**  
21 **SOUTHERN DISTRICT OF CALIFORNIA**

22 ESTRELLA COSTALES,

23 Plaintiff,

24 vs.

25 AMERICA'S SERVICING  
26 COMPANY, and LOAN CENTER OF  
CALIFORNIA SPECIALIZED LOAN  
SERVICES,

Defendants.

Case No.: 3:08-CV-01079-L-JMA

**NOTICE OF MOTION AND  
MOTION TO DISMISS BY  
WELLS FARGO BANK, N.A., dba  
AMERICA'S SERVICING CO.;  
MEMORANDUM OF POINTS  
AND AUTHORITIES IN  
SUPPORT THEREOF**

DATE: 10/14/08  
TIME: 10:30 a.m.  
DEPT: 14

*[Filed concurrently with Request for  
Judicial Notice]*

Complaint filed: June 18, 2008

1 PLEASE TAKE NOTICE that on October 14, 2008, at a.m., or as soon  
2 thereafter as counsel may be heard in Courtroom 14 of the above-entitled Court  
3 located at 880 Front Street, Room 4290, San Diego California 92101. Defendant  
4 Wells Fargo Bank, N.A. dba America's Servicing Company ("Wells Fargo") will  
5 move the Court for an order dismissing the action as to Wells Fargo.

6 The motion is brought pursuant to the Federal Rules of Civil Procedure,  
7 Rules 12(b)(5) and 12(b)(6).

8 The motion is based upon this Notice of Motion and Motion, the  
9 Memorandum of Points and Authorities attached hereto, the pleadings and papers  
10 on file for this matter, and upon such other matters as may be presented to the Court  
11 at the time of the hearing.

12 DATED: July 15, 2008

SEVERSON & WERSON  
A Professional Corporation

13  
14 By: 

15 SUZANNE M. HANKINS  
16 JARLATH M. CURRAN, II  
17 Attorneys for Defendants  
18 WELLS FARGO BANK, N.A.  
19 dba AMERICA'S SERVICING  
20 COMPANY  
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## MEMORANDUM OF POINTS AND AUTHORITIES

### **I. INTRODUCTION**

Plaintiff's complaint claims that defendants violated the Truth in Lending Act ("TILA") by (1) failing to include certain finance charges; (2) improperly including certain finance charges; and (3) understating the annual percentage rate ("APR"). Beyond these conclusory allegations, Plaintiff makes no attempt to identify the finance charges to which she refers or how these charges were wrongfully excluded or included. Similarly, Plaintiff provides no explanation of why she believes the APR is incorrect. Nor does Plaintiff specify which defendant actually violated TILA. Such vague allegations make it impossible for Wells Fargo to provide a meaningful response.

Furthermore, Plaintiff did not file this action within one year of the date she executed the challenged loan agreement. As a result, her request for statutory damage is barred by the one-year statute of limitations under 15 U.S.C. section 1649(e).

In addition, Plaintiff must tender the amounts necessary to consummate the rescission (the "Rescission Balance") to the creditor as a prerequisite to rescission based on an alleged TILA violation.<sup>1</sup> Since Plaintiff has failed to do so here, her complaint does not state a cause of action.

Finally, Plaintiff served her summons and complaint on Wells Fargo by placing a copy of each document in an envelope mailed via the US Postal System, postage prepaid. Service by this method is insufficient.

Due to the foregoing, this motion to dismiss pursuant to Rules 12(b)(5) and 12(b)(6) of the Federal Rules of Civil Procedure should be granted.

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<sup>1</sup> "Rescission Balance is the principal of the mortgage loan minus all interest and fees paid to the creditor and all third parties at closing, and any fees paid to the creditor after closing. *Semar v. Platte Valley Federal Savings and Loan*, 791 F.2d 699 (9<sup>th</sup> Cir. 1986)

## II. ARGUMENT

### A. Plaintiff's Cause of Action for Violation of the Truth In Lending Act Fails to State a Claim for Relief

In order to justify a dismissal under Federal Rule of Civil Procedure 12(b)(6) the Court must determine "whether, if the factual averments of the complaint were proved, they would establish a cause of action." *Weisbuch v. County of Los Angeles* 119 F.3d 778, (9<sup>th</sup> Cir. 1997) citing *National Wildlife Federation v. Espy*, 45 F.3d 1337, 1340 (9<sup>th</sup> Cir. 1995); *Argabright v. United States*, 35 F.3d 472, 474 (9<sup>th</sup> Cir. 1994). "The court is not, however, bound to assume the truth of legal conclusions merely because they are stated in the form of factual allegations." *York v. Huerta-Garcia*, 36 F.Supp.2d 1231 (S.D. Cal. 1999) (citing *Western Mining Council v. Watt*, 643 F.2d 618, 624 (9<sup>th</sup> Cir.), *cert. denied*, 454 U.S. 1031 (1981)). Nor need the court accept as true "allegations that contradict facts that may be judicially noticed by the court, *see Mullis v. United States Bankruptcy Court*, 828 F.2d 1385, 1388 (9<sup>th</sup> Cir. 1987), and may consider documents that are referred to in the complaint whose authenticity no party questions, *see Branch v. Tunnell*, 14 F.3d 449, 453-54 (9<sup>th</sup> Cir. 1994)." *Shwarz v. U.S.*, 234 F.3d 428 (9<sup>th</sup> Cir. 2000).

"Dismissal is proper if a complaint is vague, conclusory, and fails to set forth any material facts in support of the allegation." *York v. Huerta-Garcia*, *supra*, at 1234 citing *North Star Intern v. Arizona Corp. Comm'n*, 720 F.2d 578, 583 (9<sup>th</sup> Cir. 1983). Moreover, plaintiff bears the burden of pleading sufficient facts to state a claim, even in the context of a pro se plaintiff, when the federal rules are more liberal as to pleading. *Id.* (citations omitted).

Here, Plaintiff's complaint fails to specifically address any acts and conduct allegedly engaged in by Wells Fargo sufficient to meet the requirements of her TILA claim. Furthermore, Plaintiff has requested relief that is barred by the one year statute of limitations set forth in 15 U.S.C. section 1640(e). Finally, Plaintiff

1 has failed to allege tender of the Rescission Balance, which is a prerequisite to her  
2 claim.

3 1. Plaintiff has not Alleged a TILA Violation Entitling Her to  
4 Damages

5 Plaintiff's Complaint broadly alleges that defendants (1) failed to include  
6 certain finance charges; (2) improperly included certain finance charges; and (3)  
7 understated the APR. (See Complaint, ¶ 14.) However, Plaintiff does not identify  
8 what finance charges were incorrect, what finance charges should and should not  
9 have been disclosed, or how the APR was understated. Plaintiff does not even  
10 identify what defendant actually committed the alleged violations or an alternative  
11 basis for liability with respect to the remaining defendants. These vague and  
12 conclusory allegations make it virtually impossible for Wells Fargo to provide a  
13 meaningful response.

14 2. Plaintiff's Claim for Statutory Damages is Barred by 15 U.S.C.  
15 Section 1640(e)

16 Based on alleged TILA violations Plaintiff requests statutory damages under  
17 15 U.S.C. section 1640(a). (Complaint, Prayer for Relief.) This request, however,  
18 is barred by the applicable statute of limitations.

19 15 U.S.C. § 1640(e) states, in pertinent part: "Any action under this section  
20 may be brought in any United States district court, or in any other court of  
21 competent jurisdiction, within one year from the date of the occurrence of the  
22 violation." Here, Plaintiff's claim accrued on March 24, 2006, the date Plaintiff  
23 "entered into a consumer credit transaction [] with Defendants." (Complaint, ¶ 7.)  
24 Thus, the limitations period for any damage claim Plaintiff may have had under 15  
25 U.S.C. section 1640 would have expired on March 24, 2007. Plaintiff did not file  
26 the current action until June 18, 2008. As such, Plaintiff's damage claim is barred.

1           3.     Plaintiff Has Not Alleged Tender of the Rescission Balance on the  
2                 Loan

3           Under the literal language of 15 U.S.C. section 1635(b), when the consumer  
4 exercises the right of rescission, the security interest becomes void. Within 20 days  
5 of receipt of a rescission demand, the creditor is required to terminate the security  
6 interest. 15 U.S.C. section 1635(a). The consumer is not required to return the  
7 principal of the loan to the creditor until the creditor has released the security  
8 interest. 15 U.S.C. section 1635(b). In effect, the creditor would be left unsecured  
if the consumer failed to return the principal balance.

9           However, the final sentence of Section 1635(b) has been interpreted to allow  
10 courts the right to demand that the borrower return the loan's principal balance to  
11 the creditor as a prerequisite to rescinding that loan. This sentence states that "the  
12 procedures prescribed by this subsection shall apply except when otherwise ordered  
13 by a court." In applying this sentence, federal courts have used equitable principles  
14 to benefit a mortgage lender in a rescission that could otherwise lead to inequitable  
consequences.

15           In *Powers v. Sims and Levin*, 542 F.2d 1216 (4th Cir. 1976), the court held  
16 that a rescission demand by a consumer who did not return the principal of the  
17 mortgage loan was "fatally deficient." *Id.* at 1221-1222. The Court said that  
18 "[r]escission is an equitable doctrine, and there is nothing in the statutory provision  
19 of the right of rescission which limits the power of the court of equity to  
20 circumscribe the right of rescission to avoid the perpetration of stark inequity...  
21 The District Court and we, exercising traditional equity powers, may condition the  
22 Borrower's continuing right of rescission upon their tender to the lender of all of  
the funds spent by the lender..." *Id.*

23           The Ninth Circuit has followed suit by asserting that, even if the plaintiff has  
24 a right to seek rescission under TILA, the plaintiff cannot effectuate rescission  
25 unless they can return the principal amounts borrowed as required by Reg Z.  
26 *Yamamoto v. Bank of New York*, 329 F.3d 1167, 1171 (9th Cir. 2003) (courts have

1 the power to confirm that the borrower “could repay the loan proceeds before going  
2 through the empty (and expensive) exercise of a trial on the merits”). Here,  
3 although Plaintiff claims to have demanded rescission, Plaintiff does not allege that  
4 she has tendered the Rescission Balance pursuant to 15 U.S.C. section 1635(b).  
5 Plaintiff’s payment of the loan’s principal balance is a prerequisite to her equitable  
6 claim of rescission.

7 **B. Plaintiff Failed to Properly Serve the Summons and Complaint on**  
8 **Wells Fargo**

9 Rule 4(e)(1) of the Federal Rules of Civil Procedure (“FRCP”) states that a  
10 plaintiff may served an individual by “following state law for serving a summons in  
11 an action brought in courts of general jurisdiction in the state where the district  
12 court is located or where service is made.” FRCP Rule 4(h) incorporates this  
13 method as a proper means to serve a corporate defendant. Under California law,  
14 the plaintiff may serve a corporate defendant via (1) personal delivery to an  
15 authorized agent; (2) substitute service; (3) service by mail coupled with an  
16 acknowledgment of receipt; and (4) publication. California Code of Civil  
17 Procedure (“CCP”) § 415.10 et seq.

18 Plaintiff’s “Proof of Mailing and Contents Mailed” reflects that Plaintiff  
19 served her summons and complaint on Wells Fargo by placing true copies of the  
20 documents in “an envelope to be mailed via US Postal System, postage prepaid,  
21 following ordinary [sic] business, practice...” (Proof of Mailing and Contents  
22 Mailed, attached as Exhibit 1 to the Request for Judicial Notice.) This manner of  
23 service is insufficient to satisfy the requirements of CCP § 415.10, et seq.

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1 **III. CONCLUSION**

2 Based on the foregoing, Wells Fargo respectfully requests that the Court  
3 grant its motion to dismiss.  
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5 DATED: July 15, 2008  
6

SEVERSON & WERSON  
A Professional Corporation

7  
8 By: 

9 SUZANNE M. HANKINS  
10 JARLATH M. CURRAN, II  
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1 ☐ **(BY ELECTRONIC SERVICE)** Pursuant to CM/ECF System, registration  
2 as a CM/ECF user constitutes consent to electronic service through the  
3 Court's transmission facilities. The Court's CM/ECF system sends an e-mail  
4 notification of the filing to the parties and counsel of record listed above who  
5 are registered with the Court's EC/ECF system.

6 ☐ **FEDERAL** - I declare that I am employed in the office of a member of the  
7 bar of this Court at whose direction the service was made.

8 Executed on July 15, 2008 at Irvine, California.

9  
10 By:   
11 MARISA PUNG  
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